BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JANICE STOCKBAUER	)	
Claimant	)	
VS.	)	
	)	Docket No. 242,983
KISTLER'S SERVICE, INC.	)	
Respondent	)	
AND	)	
	)	
CLARENDON NATIONAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Both respondent and claimant appeal Administrative Law Judge John D. Clark's January 9, 2002, Award. The Appeals Board heard oral argument on July 16, 2002.

APPEARANCES

Claimant appeared by her attorney, Randall E. Fisher of Newton, Kansas. Respondent and its insurance carrier appeared by their attorney, David F. Menghini of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Award.

ISSUES

This is a claim for a low back injury that occurred on March 12, 1998, during a lifting incident while claimant was working for the respondent. The ALJ awarded claimant a 50 percent permanent partial general disability based on a work disability.

Claimant appeals and contends that she proved she was entitled to a 66 percent permanent partial general disability instead of the 50 percent found by the ALJ.

In contrast, respondent also appeals and contends the ALJ's 50 percent permanent partial general disability award should be reduced to an 8 percent permanent partial general disability award based on claimant's permanent functional impairment. Respondent first argues that claimant was discharged by the respondent for misconduct

for insubordination disqualifying her for a work disability. Secondly, respondent argues that after claimant was terminated she failed to make a good faith effort to find appropriate employment and is disqualified from receiving work disability because she retains the ability to earn the same average weekly wage post-injury as she did pre-injury. The respondent also argues, based on the parties' stipulated pre-injury average weekly wage, it overpaid claimant temporary total disability compensation and it is entitled to a credit for the overpayment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Board makes the following findings and conclusions:

The compensability of claimant's March 12, 1998, low back injury is not an issue on appeal. Thus, the Board finds no need to repeat the ALJ's findings and conclusions set out in the Award concerning claimant's injury and subsequent medical treatment in this Order. Those findings and conclusions are, therefore, adopted by the Board as if specifically set forth herein.

What is the Nature and Extent of Claimant's Disability?

Here, the principal issue on appeal is the nature and extent of claimant's disability. Specifically, whether claimant is entitled to a work disability award and if so, what percentage of work disability was proven by claimant.

Claimant's treating physician, neurosurgeon Paul S. Stein, M.D,. was the only physician to testify in this case. He opined, in accordance with the American Medical Ass'n *Guides to the Evaluation of Permanent Impairment* (4th ed.), that as the result of claimant's work-related low back injury she sustained an 8 percent permanent functional impairment. The ALJ adopted that finding and neither party disputed the finding. Thus, the Board affirms the 8 percent permanent functional impairment finding made by the ALJ. In fact, because respondent argues claimant is not entitled to a work disability, it requests the award be modified to reflect an award of an eight percent permanent partial general disability.

As a result of claimant's low back injury, she suffered a left L4-5 disc herniation and an L5-S1 disc protrusion. On August 17, 1998, claimant underwent a partial hemilaminectomy and diskectomy at L4-5 and a laminectomy and exploration with decompression at L5-S1. Dr. Stein released claimant to return to light duty work on October 22, 1998, for one-half days for two weeks and then eight hours per day. Claimant's work restrictions were limited to lifting no more than 15 pounds; no bending or twisting more than one-half the way; and sitting, standing and walking limited to one hour at a time with breaks. Claimant did not return to work at that time, because respondent would not accommodate those restrictions.

On January 15, 1999, Dr. Stein released claimant to return to work with permanent restrictions as set out in a functional capacity evaluation (FCE) that Dr. Stein had claimant undergo on January 4, 1999. Those restrictions are summarized as follows: (1) no kneeling or ladder climbing, (2) occasional bending and squatting, (3) frequent crawling, reaching above shoulder, sitting, standing, walking, alternate sitting/standing, using hand controls, using feet controls and stair climbing, (4) continuous balance-25 feet and performing functional movements with both the left and the right foot, and (5) at various heights, body position and frequency, maximum safe lift 15 pounds from floor to knuckle and shoulder to overhead and 20 pounds from 12 inches from floor to knuckle and knuckle to shoulder. Under the summary of results, the maximum capacity level at which patient can function was indicated as sedentary.

Claimant returned to work for the respondent on January 24, 1999.[1] Upon returning to work for respondent, claimant was only allowed to work three or four hours per day and only three or four days per week compared to the approximately 30 hours per week claimant worked for respondent. Because of claimant's restrictions, she was only capable of operating the cash register, cooking and serving some of the food. On March 18, 1999, claimant asked respondent for more hours and notified respondent that Dr. Stein's restrictions were permanent.

Respondent then discharged claimant under the pretext that claimant had been rude to a customer. But claimant testified she had not been rude to the customer and further had not done anything wrong that would warrant a discharge. Neither respondent's owner nor any of his representatives testified to contradict claimant's testimony concerning the circumstances surrounding claimant's discharge.

Respondent's business is located two and one-half miles west of Leon, Kansas. Claimant resides in Leon, Kansas with her daughter and two grandchildren. After she was terminated, claimant looked for employment at grocery stores, restaurants and gas station/convenience stores located in communities in the local area of Leon, Douglass and Augusta, Kansas. Claimant's termination took place on March 18, 1999,[2] and the last time she testified in this case was at the October 9, 2001, regular hearing. At that time, claimant testified that she, over this approximately two years and seven month period, only contacted seven prospective employers concerning possible employment. At the regular hearing, claimant remained unemployed, except for babysitting three days per week with her grandchildren. The record does not contain any evidence as to what, if any, compensation she received from her daughter for her babysitting services.

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[1] Cl. Depo.(October 16, 2000) Cl. Ex. 1.

[2] Cl. Depo. (October 16, 2000) Cl. Ex. 1.

Respondent first argues that claimant is not entitled to a work disability in excess of her functional impairment because she was discharged for insubordination. Not all terminations, however, disqualify a claimant's entitlement to a work disability[3] The Board finds claimant proved through her uncontradicted testimony that she was discharged by respondent after she requested more hours of work in accordance with Dr. Stein's permanent restrictions. Respondent told claimant she was discharged because of being rude to a customer. But claimant disputed that fact and neither respondent's owner nor any of his representatives contradicted claimant's testimony. Thus, the Board concludes respondent failed to prove claimant was discharged for misconduct.

The respondent next argues, claimant is not entitled to a work disability because after her termination, she failed to make a good faith effort to find appropriate employment.[4] As a result, respondent argues the record proves claimant retained the ability to either earn a wage equal to or in excess of her stipulated pre-injury average weekly wage of $172.14. Accordingly, respondent argues that a wage should be imputed to the claimant sufficient to disqualify her from a work disability. Respondent further argues that conclusion is supported by the opinions of both vocational experts who testified in this case. Karen Terrill and Richard Santner both opined that within the city of Wichita's labor market claimant retained the ability to find employment equal to or greater than her pre-injury stipulated average weekly wage of $172.14. In contrast, claimant argues she proved she is entitled to a 66 percent work disability based on a 32 percent work task loss and a 100 percent wage loss.

The Board agrees with the respondent that claimant failed to prove she made a good faith effort to find appropriate employment. But the Board disagrees that claimant's labor market also included the city of Wichita. The Board finds Karen Terrill's opinions are the most persuasive on claimant's labor market and post-injury earning ability.

The city of Wichita is at least 30 miles one way from Leon, Kansas. And depending on the location of the employer in Wichita, the time to drive to Wichita and return would be approximately 1.5 hours daily. Additionally, Ms. Terrill opined, taking into consideration claimant's permanent restrictions, she could only earn from minimum wage of $5.15 per hour up to the $6.00 per hour she had earned previously while working for respondent. Balancing those low weekly earnings with the cost of the gasoline and depreciation on an automobile, plus the additional time required to travel to and from Wichita, the Board finds that it would not be economically feasible for claimant to be expected to travel to Wichita for such a low paying job. Thus, the Board concludes claimant's appropriate labor market is in the cities of Leon, Augusta, Douglass, Kansas and that immediate surrounding area. In that labor market, Ms. Terrilll opined that claimant retained the ability and jobs were

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[3] *See Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P. 2d 1246 (1999).

[4] *See Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

available for claimant to earn minimum wage working 20 hours per week or $103 per week.[5]

Respondent also argues, since claimant's March 12, 1998, accident, she has suffered from an intervening eye condition, not related to her work injury, disqualifying her from a work disability. Respondent contends that claimant's present eye condition directly affects her ability to find appropriate employment. The $103 post-injury average weekly wage found to be appropriate to impute to claimant in determining her wage loss was determined taking into consideration only claimant's work-related restrictions and did not take into consideration her unrelated eye condition.

Work disability is determined by claimant's loss of ability to perform work tasks the claimant performed in jobs during the 15 year period next preceding the work-related accident. Work task loss shall be the extent, expressed as a percentage, in the opinion of the physician. That work task loss percentage then is averaged together with claimant's wage loss.[6]

Here, claimant did not have a physician express an opinion on the percentage of claimant's work task loss. The only evidence on work task loss contained in the record is the opinion of claimant's vocational expert Karen Terrill. Ms. Terrill, utilizing Dr. Stein's permanent work restrictions, opined that claimant had lost 12 of her previous 37 work tasks for 32 percent work task loss. Without presenting any evidence in support of his contention, claimant's attorney argues no physician will provide a work task loss opinion. Therefore, claimant contends Karen Terrill's opinion based on Dr. Stein's restrictions is reasonable and was arbitrarily rejected by the ALJ. But a review of past Board decisions will clearly show that many physicians have testified to work task loss in workers compensation proceedings.

The Board agrees with the ALJ and concludes that the claimant failed to meet her burden of proof for the work task loss component of the work disability test. The work disability definition contained in the statute is clear and unambiguous that an employee's work task loss percentage has to be "in the opinion of the physician." Where the claimant fails to offer an opinion of a physician regarding work task loss, claimant fails to meet her burden of proof.[7]

Claimant also argues she proved she made a good faith effort to find employment after her termination. As previously set forth above, the Board finds that claimant failed to

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[5] Terrill Depo. at 20.

[6] *See* K.S.A. 1997 Supp. 44-510e(a).

[7] *See Gadberry v. R. L. Polk & Co.*, 25 Kan. App. 2d 800, 803, 975 P.2d 807 (1998).

make a good faith effort to find appropriate employment and a post-injury average weekly wage should be imputed to claimant.[8] Comparing claimant's post-injury imputed average weekly wage of $103 with her pre-injury average weekly wage of $172.14 results in a 40 percent wage loss. The Board, therefore, concludes claimant is entitled to a 20 percent permanent partial general disability based on a work disability found by averaging a zero percent work task loss with a 40 percent wage loss.

Is Respondent Entitled to a Credit for Overpaying Claimant Temporary Total Disability Compensation?

At the regular hearing, the ALJ admitted respondent's Exhibit 1 indicating that respondent had paid claimant a total of $5,950.14 of temporary total disability compensation at $141.67 per week which represents 42 weeks of temporary total disability compensation. In the Award, listed at stipulation number ten, the ALJ showed the temporary total disability compensation was paid at the rate of $114.77 per week for 51.84 weeks or $5,950.14.[9] The $114.77 temporary total disability rate was computed from the stipulated pre-injury average weekly wage of $172.14. But the weekly rate the respondent paid claimant temporary total disability compensation was at $141. 67 as noted in respondent's Exhibit 1 admitted at the regular hearing. Thus, the Board, in the computation of the award below, will show that claimant is entitled to 42 weeks of temporary total disability compensation at $114.77 per week or $4,820.34 instead of the 51.84 weeks at $114.77 or $5,950.14. The award also will provide that the total award shall be due and owing less the amounts previously paid resulting in respondent receiving a $1,129.80 credit for overpayment of temporary total disability compensation.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ John D. Clark's January 9, 2002, Award should be modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Janice Stockbauer, and against the respondent, Kistler's Service, Inc., and its insurance carrier, Clarendon National Insurance Company, for an accidental injury which occurred on March 12, 1998, and based upon an average weekly wage of $172.14.

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[8] *Copeland* at 320.

[9] Respondent paid claimant 42 weeks of temporary total disability compensation at $141.67 per week or $5,950.14. But when the correct temporary total disability compensation weekly rate of $114.77 is used, because of rounding, the total equals $5,949.68. Because respondent's credit will be based on the actual amount paid, the $5,950.14 amount is also shown for the total paid at the $114.77 weekly rate.

Claimant is entitled to 42 weeks of temporary total disability compensation at the rate of $114.77 per week or $4,820.34, followed by 77.6 weeks of permanent partial disability compensation at the rate of $114.77 per week or $8,906.15, for a 20 percent permanent partial general disability, making a total award of $13,726.49, which is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

Respondent and its insurance carrier are ordered to pay all reasonable and necessary medical expenses for the March 12, 1998, low back injury as authorized medical.

Future medical may be requested upon proper application to the Director of Workers Compensation.

Claimant is further entitled to unauthorized medical up to the statutory maximum, upon presentation of an itemized statement verifying same.

All other orders contained in the Award are adopted by the Board.

IT IS SO ORDERED.

Dated this ____ day of February 2003.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randall E. Fisher, Attorney for Claimant
David F. Menghini, Attorney for Respondent
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation